In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 642

CROFT-MULLINS ELECTRIC CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the United States District Court for the Middle District of Georgia (R. 34, 51)[1] are not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A1–A19) is reported at 333 F. 2d 772.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1964. A timely petition for rehearing was denied on August 3, 1964. The petition for a writ of certiorari was filed on November 2, 1964. The

[1] "R" refers to the printed record in the Court of Appeals a copy of which has been filed in this Court.

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jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under a fixed price construction contract, the government is liable for its negligent failure to supply needed material in time to enable the contractor to complete by the contract deadline, where the contract disclaimed any warranty of delivery time for government-furnished material and exculpated the government from liability for "any delay."

STATEMENT

In this contract action under the Tucker Act, 28 U.S.C. 1346, the district court found the United States liable for negligently failing to furnish certain required equipment in time to enable the contractor to complete the job by the original contract deadline. Under the contract, petitioner, an electrical contractor, undertook to perform certain work on the airfield lighting at the Pensacola Naval Air Station. The contract provided that (R. 22–23):

> The time for completion of the work under this contract is based upon the expectation that the Government-furnished property, if any, as set forth in the specification will be delivered to the Contractor at the times stated or, if not so stated, in sufficient time to enable the Contractor to perform within the time for completion of the contract work. In the event that the Government-furnished property is not delivered to the Contractor by such time or times, the provisions of Clause 5 respecting an extension of time shall apply. The Government, however, does not warrant or guarantee any

> time or times for delivery of such property. For any delay in delivery or failure to deliver any or all of the Government-furnished property, the Government shall not be liable to the Contractor for damages, loss of profits, or increased costs; * * *.

Clause 5 of the contract, referred to in the foregoing provision, provided that in case of delays for which the contractor was not responsible, the time for completion would be extended (R. 19–22). The contract initially required the work to be completed by October 28, 1957 (R. 12). By reason of the government's failure to provide needed equipment in time, completion was not possible by that date. Accordingly, the time for completion was successively extended to August 29, 1958. No complaint is made of failure to complete within the extended time.

The district court found that the government had an implied obligation not to hinder the contractor in the performance of the contract, and that this obligation was breached by the negligent failure to furnish material needed by the contractor to complete the work by the deadline originally specified in the contract (R. 44, 56). Additionally, it found that the contractor had been assured before the contract was signed that all materials to be furnished by the government would be on hand shortly after the notice to proceed was given and that, on four occasions during the life of the contract, government representatives assured the contractor that the materials would be received "in the near future," and that "continuous efforts" were being made to secure the materials

(R. 52–53). On the basis of these assurances, the district court found that the government was "negligent in encouraging plaintiff to maintain its forces on the job by promising immediate and early deliveries without knowing that it would be able to make good on its promises" (R. 56).

Judgment was rendered against the government in the amount of $9,380.44 (R. 58–59), which was the estimated difference between the contractor's actual cost of completion and what the cost would have been if the government-furnished material had arrived in time to enable completion by the original contract deadline (R. 27–28, 54–55).

The Court of Appeals reversed. It held that any implied promise by the government to furnish property by any particular date was negatived by the contract provision that the "Government, however, does not warrant or guarantee any time or times for delivery of such property" (Pet. App. A7–A8). It also held that no claim under the Tort Claims Act was presented by the government's negligent failure to furnish equipment, by reason of (i) the running of the statute of limitations, and (ii) the exculpatory clause for "any delay in delivery * * * of the Government-furnished property, the Government shall not be liable to the Contractor for damages, loss of profits, or increased costs") (Pet. App. A9).

As to the assurances of early delivery made by the government apart from the contract, the Court of Appeals held that the assurance made before the signing of the contract was immaterial under the parol evi-

dence rule (Pet. App. A14–A15). The assurances made after the contract was signed were held not to constitute amendments of the formal written contract, and not to form the basis of liability for misrepresentation under the Tort Claims Act (Pet. App. A16).

DISCUSSION

The decision of the Court of Appeals was correct. The decisions of this Court involving similar construction contracts hold that the government is not liable to its contractor for failure to enable the contractor to complete on time, the contractor's only remedy in this situation being an extension of the contract deadline. *Crook Co.* v. *United States*, 270 U.S. 4; *United States* v. *Rice*, 317 U.S. 61; *United States* v. *Foley Co.*, 329 U.S. 64. Even if the trial court's finding of negligence in the present case were relevant to an allegation of breach of contract (see *United States* v. *Foley Co.*, 329 U.S. 64, 66–67), the contract provision exculpating the government from liability for "any delay in delivery * * * of the Government-furnished property" is sufficient to negative any contractual intent to provide for the liability here imposed. While a Court of Claims case has held that such a clause cannot be applied to exculpate the government from "almost willful" conduct (*Ozark Dam Constructors* v. *United States*, 130 Ct. Cl. 354, 359–360, 127 F. Supp. 187, 190–191), it has never been held that the ordinary negligence here found requires imposition of contractual liability for delay damages despite a specific disclaimer of any warranty of delivery time and an exculpation of liability for any delay.

As to the possibility of liability apart from the formal written contract, it is clear that liability in tort is barred by the two-year statute of limitations. 28 U.S.C. 2401(b). Any possible tort here would have been completed by October 4, 1958 (when the contract was actually completed); the suit was not brought until April 26, 1961 (R. 4).[2]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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[2] Since the date of the occurrences which gave rise to the present case, the Federal Procurement Regulations have been amended to prescribe a clause requiring an adjustment in contract price in the amount of any increased cost of performance necessarily caused by an unreasonable period of delay resulting from the failure of the contracting officer to act within the time specified in the contract (or if no time is specified, within a reasonable time). The adjustment must be made pursuant to the disputes clause. The new clause is required for fixed-price construction contracts "whenever it is desired * * * to provide for administrative relief for unreasonable periods of delay caused by the contracting officer * * *." 41 C.F.R. 1-7.602-1, adopted January 26, 1960, 25 F.R. 648. The same provision has been authorized by the Armed Services Procurement Regulations. 32 C.F.R. (1964 Cum. Supp.) 7.604-3.

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